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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

March 30, 2001

Magalie Roman Salas
Secretary
Federal Communications Commission
Room TW-A325
445 Twelfth Street, S.W.
Washington, D.C. 20554

ORIGINAL

Re: CC Docket Nos. 96-98; 99-68; 96-262

Dear Ms. Salas:

On March 29, 2001 Kelsi Reeves and Don Shepheard from Time Warner Telecom, Kevin Joseph and Mary Albert from Allegiance Telecom, Inc. and Gerry Salemme from XO Communications met with Sarah Whitesell of Commissioner Tristani's office and discussed the contents of the attached document with her.

In accordance with Section 1.1206(b) (1), I am filing two copies of this notice in the dockets identified above. If you or your staff have any questions, please do not hesitate to contact me.

Sincerely,

Kevin M. Joseph

Kevin M. Joseph
Vice President
Government Affairs

Attachment

Cc: Sarah Whitesell

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List A B C D E

Time Warner Telecom – Allegiance Telecom – XO Communications

CLEC Access Charge Proceeding

- The Commission's decision should provide for a reasonable transition period.
  - Avoid significant revenue shock at a particularly difficult time for CLECs.
  - Historically, the Commission has provided carriers with reasonable transitions to avoid revenue shock and protect competition.
    - The Commission allowed small IXCs to avoid cost-based rates for switched Local Transport for well over 10 years to protect competition.
      - Initial Equal-Rate-Per-Unit-of-Traffic rate structure
      - Subsidies were continued under Local Transport Restructure Proceeding
      - Extended phase-down of the Transport Interconnection Charge (TIC) to protect ILEC revenue
      - Five-year transition adopted for price-cap carriers under CALLS Plan and proposed under MAG Plan for non-price cap carriers.
- Key issue is if, and under what conditions, IXCs can refuse to provide long-distance service to customers of CLECs whose rates they believe to be too high.
  - Both AT&T and Sprint have resorted to illegal self-help by refusing to pay CLECs' tariffed rates. AT&T claims that it has refused to accept CLEC access service or has requested termination of such services.

- Section 201(a) mandates that IXCs provide service to any end user upon *reasonable* request. Section 202(a) prohibits IXCs from unreasonably discriminating among end users. Thus under the current rules, IXCs cannot refuse or terminate service to CLEC local customers absent a showing that the tariff terms and conditions are unreasonable.
  - This interpretation is consistent with the Commission's reasoning in the recent Total Telecommunications and Atlas Telephone v. AT&T complaint decision (File No. E-97-003).

- There are three ways to reach the statute's "reasonableness" standard.
  1. Status Quo – Under current rules the filed tariff rates of non-dominant carriers are presumed reasonable and lawful, and are governed by the Filed Rate Doctrine. Hence, by definition, CLEC tariff rates are reasonable and lawful until proven otherwise.
     - A section 208 complaint is the context in which IXCs may attempt to rebut the presumption. It is TWTC's position that an IXC may not refuse or discontinue service to customers unless it has successfully rebutted the presumption of reasonableness.
     - This can be a cumbersome process leading to a plethora of complaints that could overburden the Commission's enforcement resources.

2. <u>Mandatory Detariffing</u> – The Commission could require the detariffing of CLEC access tariffs, depriving CLECs of the Filed Rate Doctrine protection. However, this solution has significant drawbacks.
   - Leaves the determination of "reasonable" to negotiations of the parties, but what happens if the parties cannot agree? Can the IXC unilaterally determine what constitutes reasonableness under the statute?
   - Negotiations likely to be characterized by unequal bargaining power and high transaction costs.
   - Likely to result in customer confusion and limited choice.
   - The CLEC access context is fundamentally different from domestic and international long distance services that the FCC has detariffed because IXC refusals to purchase CLEC access will degrade the service of third parties with no connection to the IXC-CLEC relationship (i.e., the IXC's customers that do not subscribe to the CLEC's service but merely seek to call the CLEC's customers). Such third-party harm was not an issue in prior FCC detariffing decisions.
3. <u>Benchmark Rates</u> – The Commission could establish a benchmark rate at which CLEC access rates are presumed reasonable under the statute.
   - Simple standard that avoids costly negotiation and litigation, and insures continued customer choice.
   - Rates at or below the benchmark would continue to be permissively tariffed and subject to the Filed Rate Doctrine. Above the benchmark would be subject to mandatory detariffing.
   - Commission should affirm that benchmark rates do not represent a judgment as to the reasonableness of prior CLEC rates.

- The ALTS GREAT Proposal for an initial benchmark rate of 2.5 cents per minute is reasonable.
  - Represents a significant initial rate reduction for most CLECs and eliminates excessively high-rate outliers. Study submitted by ALTS points to an average rate reduction of 60%.
  - Rates would be reduced over a five-year transition to parity with ILEC rates. The term of the transition is consistent with both the CALLS Plan and the proposed MAG Plan.

- The AT&T proposal provides no real transition and would adversely affect CLEC revenues. Represents an immediate average rate reduction of over 70%, with one-year transition to an 85% rate reduction.

- The alternative proposed here would provide the following benefits:
  - Solution to industry controversy that is consistent with the statute and avoids extensive litigation and continued IXC self-help measures.
  - Certainty for achieving parity with ILEC access rates over a transition period already viewed as reasonable by the Commission.
  - Avoidance of customer confusion and preservation of customer choice.

Time Warner Telecom – Allegiance Telecom – XO Communications

Reciprocal Compensation Proceeding

- An immediate revenue reduction of 50% does not provide a reasonable transition.
  - Results in a $1 Billion annualized revenue reduction. $1.3 Billion with 6-month transition to second step.
  - CLECs have already experienced significant reduction in reciprocal compensation through state commission decisions.
- There is no evidence in the record in this proceeding, nor in any state proceeding, to support a cost-based rate below $.001/minute as the end-point of a transition plan for ISP-bound traffic. Most state commissions have concluded that there is no difference between ISP-bound and other local traffic, with rates at or exceeding $.002/minute.
- An initial reduction of about 35% ($.0025/minute), with an end-point of $.001/minute would be more reasonable and provide CLECs with a smoother transition.
  - Impact is likely to be significantly greater if states are allowed to retain rates lower than the transition plan or remain at bill and keep, and if a growth ceiling is adopted.

- While a growth ceiling is unnecessary and constitutes *de facto* bill and keep, an order imposing a growth ceiling must address, at a minimum, the following:
  - In new markets, allow 12 months experience before implementing growth ceiling. Or, at a minimum, attribute average of above rate-cap traffic on all of a CLEC's switches to the new market.
  - Insure that ILEC payments are not withheld pending "true-ups." CLECs must be able to recognize revenue on their books without holding in reserve for extended periods of time.
    - Allow use of monthly or quarterly lag as basis for forward-looking ratio application. As is the case in New York, no true-up is necessary for a rolling month or quarter application.
    - Withholding of payment pending end-of-year growth calculation is not necessary and should not be allowed.
    - ILECs will use every tool at their disposal to avoid payment. Therefore, Commission should provide a process for rapid resolution of billing disputes involving rate-cap or growth-ceiling issues. For example, the Commission could allow carriers to bring such disputes to the state commissions, which would be required to resolve the dispute within 60 days.
- The transition-plan rate cap and growth ceiling should be based on a <u>rebuttable</u> presumption that all traffic above the rate cap or growth ceiling is ISP-based traffic. A similar rebuttable presumption that all traffic below the cap is voice traffic will provide no certainty whatsoever for CLECs. ILECs will use this opportunity to withhold any payment at all and litigate every minute billed by a CLEC.